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SUBJECT: UKRAINE: WORKSHOP ENCOURAGES JUDGES, PROSECUTORS,
POLICE TO STEP UP IPR ENFORCEMENT

REFS: A) KYIV 1450
B) KYIV 1417
C) KYIV 449

¶1. Summary: Post, in coordination with U.S., UK, and Ukrainian institutions, held an IPR enforcement workshop in Kyiv June 5-7. Ukrainian judges, prosecutors, police, and IP inspectors participated in the workshop, which focused on court proceedings for IPR-related cases. Discussions revealed several problem areas for Ukraine's enforcement bodies, and U.S. and British experts passed on best practices. The workshop bolstered our IPR dialogue with the GOU, although Post also has some "lessons learned" for any similar events in the future. Post sincerely thanks USPTO and all participants for their participation. End Summary.

¶2. In coordination with the U.S. Patent and Trademark Office (USPTO), the United Kingdom Intellectual Property Office (UKIPO), and Ukraine's State Department of Intellectual Property (SDIP), Post conducted an IPR enforcement workshop in Kyiv June 5-7. The approximately 40 Ukrainian participants included judges, prosecutors, law enforcement officials, and regional IPR inspectors. The following U.S. and British experts participated in the event:

Todd Reves	- Office of Enforcement, USPTO
Marina Lamm	- Office of Enforcement, USPTO
Steve Mellin	- Assistant U.S. Attorney, Eastern District of Virginia
Gerald Reichard	- Special Agent, FBI
Timothy Tymkovich	- Judge, U.S. Court of Appeals for the Tenth Circuit
Phil Lewis	- Senior Policy Advisor, United Kingdom Intellectual Property Office (UKIPO)
Pete Astley	- Principal Trading Standards Officer, Warrington Borough Council (UK)
Michael Buchan	- Motion Picture Association (UK Office)

¶3. Post thanks USPTO for its speedy response to our request (ref C) for training in Ukraine on IPR-related court proceedings. While investigations and prosecutions of IPR crimes are growing significantly, convictions have lagged behind. Sentencing is often light, failing to produce an adequate deterrent to IPR crimes. This workshop helped to focus Ukraine's leading IPR authorities on necessary steps to improve IPR enforcement through the courts.

----- MAJOR THEMES -----

¶4. The workshop covered a variety of themes: Working with industry, calculating damages, determining jurisdiction, sentencing, links to other crimes, property forfeiture, and handling of seized goods and equipment. As discussed below, in each area the experts offered good suggestions for Ukraine. Some of these suggestions could be adopted easily, but others may require legal or regulatory reforms.

Working with Industry -----

¶5. U.S. and UK experts repeatedly emphasized the importance of working closely with industry, from the initial days of an investigation through the trial phase. GOU officials recognized the need to cooperate with industry, but on several occasions complained that industry reps in Ukraine are not proactive enough in defending their own IP rights. On the margins of the workshop, Post conducted the fifth meeting of our IPR Enforcement Group (ref A), which brings GOU and industry reps together in the hopes of furthering their cooperation.

Calculating Damages - Strict Requirements for GOU -----

¶6. Ukrainian prosecutors and police complained of strict legal requirements demanding them to provide an expert determination of precise damages caused by an IPR crime,

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and to do so within a short period of time prior to prosecution. U.S. and UK experts responded that in their systems, estimates of damages are used as guidelines for sentencing, but are not required prior to prosecution, and are recognized as being inherently imprecise. They encouraged the Ukrainians to find a way of prosecuting such cases without quantifying exact damages, which sometimes can be nearly impossible. They also shared practical advice on how best to arrive at damage estimates when required for sentencing.

Unclear Jurisdiction -----

¶7. IPR-related crimes are currently heard in a wide range of Ukrainian courts. Viktor Moskalenko, Deputy Chairman of the High Commercial Court, argued that the Commercial Courts should be given primary jurisdiction. Other courts, he said, too often lack the specialized knowledge necessary to properly evaluate IPR crimes. Serhiy Lebid, head of the Ministry of Interior's IPR Division, called on the Supreme Court to hold a coordination meeting for all court bodies in order to establish consistent procedures for IPR crimes.

Weak Sentencing -----

¶8. Lebid also complained that, while the criminal code permits appropriate penalties, the sentences courts actually hand down in IPR crimes are not stiff enough. Law enforcement is investigating and bringing to court an increasing number of IPR cases, said Lebid, but judges continue to hand down relatively small fines and suspended sentences. U.S. Judge Tymkovich noted that formal sentencing guidelines have proven successful in the United States in maintaining sentencing consistency and in enforcing stricter sentences.

Links to Other Crimes -----

¶9. U.S. and British officials outlined several useful tactics in pursuing IPR criminals. In particular, they noted that criminals engaged in piracy/counterfeiting are often involved in other crimes, such as drug trafficking. Making this connection can often help persuade a court that may otherwise not view IPR crimes as particularly serious.

Property Forfeiture

¶10. U.S. and UK officials described how forfeiture laws can allow law enforcement to seize equipment used by IPR criminals for official purposes. Reichard noted that the FBI often uses such provisions to provide equipment to under-funded, local agencies active in IPR enforcement. Ukrainian officials expressed interest but noted that in Ukraine this program might raise public concerns of corruption.

Storage/Destruction of Infringing Goods

¶11. UK officials cautioned that storage of IPR infringing goods can present a serious challenge. SDIP officials said that storage of pirated optical disks is not a problem, but admitted, after prodding by industry reps present, that Ukraine lacks the capacity to store the counterfeit goods being found in increasing numbers. Reves from USPTO argued that lack of storage should never be an impediment to seizing infringing goods, and noted that rights holders might be able to assist. (Note: Ref A covers this issue in greater detail. End Note.)

LESSONS LEARNED

¶12. The workshop significantly bolstered our IPR dialogue with the GOU by allowing for expert-level discussions of the "nuts and bolts" of enforcement. Still, Post has

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learned a few lessons in conducting such IPR training events:

Judges are Special

¶13. Post worked hard to recruit Ukrainian judges to participate in this workshop, as numerous industry reps and even some GOU officials have described the courts as the weakest link in IPR enforcement. While we succeeded in getting fair participation during sessions focused entirely on the judge's perspective, our judiciary colleagues failed to attend most of the other sessions. Although it is beneficial for judges to discuss IPR enforcement together with prosecutors and police, future events targeting judges should probably treat them separately in order to assure better attendance.

Need to Reach Regions

¶14. Due to funding constraints, we were not able to cover travel costs for officials from outside of Kyiv for this workshop. As a result, it drew participation mostly from national-level institutions. While dialogue with national-level experts remains useful, reaching local judges, prosecutors, and police is critical in bringing IPR enforcement in Ukraine to the next level. Ref B outlined a proposed assistance program to address this need.

FOLLOW UP

¶15. The inherent risk in an individual training seminar that is not part of a longer-term program is that it will have no lasting impact on participants or on the policy environment in which they operate. To counter that risk, post will compile the chief conclusions and recommendations of the seminar for distribution to the participants, including SDIP. Post will request USPTO input and clearance on that document.

THANKS TO USPTO

¶16. Post wishes to sincerely thank USPTO and all USG participants for their funding of and involvement in the workshop. Your efforts were very much appreciated, both by us and our Ukrainian colleagues!

TAYLOR